

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

EARLE E. AUSHERMAN, *et al.*,

*

Plaintiffs-Appellants,

*

v.

*

BANK OF AMERICA CORPORATION,
et al.,

*

Civil Action No. MJG 01-438

*

Defendants-Appellees.

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* * * * *

MOTION TO SUPPLEMENT THE RECORD

Defendants-Appellees, Bank of America Corporation and Banc of America Auto Finance Corporation, pursuant to Federal Rule of Appellate Procedure 10(e) and Local Rule 10(e) of the United States Court of Appeals for the Fourth Circuit, move this Court to supplement the record and to order that the Clerk of Court certify and forward as part of the record the exhibits used at the hearing held before the Court on December 8, 2004 (“the Hearing”) and certain items of correspondence between counsel for the parties and the Court during the period January 27, 2004 through December 8, 2004, identified below and attached as **Exhibit A**. In support of this motion, Defendants-Appellees state as follows:

1. On March 17, 2005, Plaintiffs-Appellants’ counsel, Rodney R. Sweetland III, noted a timely appeal of the Court’s Judgment Order granting Defendants-Appellees’ Motion for Attorneys’ Fees (“the Motion”).

2. On May 19, 2005, the Clerk of Court certified that the record in this case was complete for purposes of the appeal and was available for transmission to the United States Court of Appeals for the Fourth Circuit upon request. *See* Paper No. 264.

3. On June 27, 2005, Plaintiffs-Appellants' counsel filed Appellants' brief and joint appendix in the Court of Appeals.

4. On August 1, 2005, Defendants-Appellees filed Appellees' brief in the Court of Appeals.

5. On August 15, 2005, Plaintiffs-Appellants' counsel filed Appellants' reply brief in the Court of Appeals.

6. Defendants-Appellees have discovered that the hearing exhibits considered by the Court during the Hearing on Defendants-Appellees' Motion are not included in the record on appeal. The Court and the parties relied upon these exhibits during the Hearing and the Court relied upon them in its Memorandum and Order granting Defendants-Appellees' Motion (Paper No. 260) but they were not entered into the record. As such, the record should be supplemented to include these exhibits. *See U.S. v. Greenwell*, 418 F.2d 845, 846 (4th Cir. 1969) ("Rule 10(e) ... vests authority in the district court to conform the record to what occurred in the district court either by supplying what has been omitted or correcting what has been erroneously transcribed"); *Wheeler v. Anchor Continental, Inc.*, 1979 WL 52, *3 (D. S.C. 1979) ("Rule 10(e) empowers the district court to correct or modify the official record ... [w]hen there is a dispute as to whether the record accurately discloses what occurred in the district court ...") (opinion attached as **Exhibit B**). The exhibits are set forth in the exhibit lists filed

with this Court on November 24, 2004 (Paper No. 258) and November 29, 2004 (Paper No. 259).

7. Defendants-Appellees further request that the record be supplemented with all correspondence not included on the Court's Docket exchanged between counsel for the parties and the Court from January 27, 2004, the day Defendants-Appellees' filed Defendant's Memorandum in support of their Motion for Attorneys' Fees (Paper No. 227) through December 8, 2004, the day the Hearing was held. The specific items of correspondence are as follows:

Letter from Peter F. Axelrad to Judge Garbis dated 4/13/04;

Letter from Ava Lias-Booker to Judge Garbis dated 4/20/04;

Letter from Peter F. Axelrad to Judge Garbis dated 4/22/04;

Letter from Peter F. Axelrad to Judge Garbis dated 5/5/04;

Letter from Peter F. Axelrad to Judge Garbis dated 7/12/04;

Letter from Ava Lias-Booker to Judge Garbis dated 7/27/04;

Letter from Pamela A. Bresnahan to Judge Garbis dated 11/11/04;

Letter from Ava Lias-Booker to Judge Garbis dated 11/23/04;

Letter from Ava Lias-Booker to Judge Garbis dated 11/24/04.

See Exhibit A.

8. The parties briefed the Court through correspondence on several occasions during this period. The correspondence includes factual and legal support for the issues relied upon by the parties and considered by the Court that are now before the Court of Appeals for consideration. The Court considered this correspondence and the parties relied upon it during the litigation of Defendants-Appellees' Motion but it is not recorded on the Court's Docket and is consequently absent from the record. The record should be

supplemented with this correspondence to conform the record to what occurred in the district court to assist the Court of Appeals during its deliberations. *See Greenwell*, 418 F.2d at 846.

9. The requested supplements to the record are intended to clarify and not to expand the record on appeal. *See U.S. v. Reckmeyer*, 1987 WL 36174, *1 (4th Cir. 1987) (“Rule 10(e) is intended to ‘allow the district court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals.’”) (copy of opinion attached as **Exhibit C**). The supplements occurred during the course of the proceedings below leading to the judgment under review in the Court of Appeals.

10. As these items are material to the issues on appeal, Defendants-Appellees respectfully request that this Court order that the record be supplemented to include the requested items in which the Court based its findings. *See Wheeler*, 1979 WL 52 at *3 (noting that the record on appeal should be supplemented to include “all of the evidence on which the district court might have based its findings.”) (attached as Exhibit B).

WHEREFORE, Defendants-Appellees move this honorable Court to order that the record be supplemented to include the exhibits from the hearing held on December 8, 2005, and the items of correspondence listed above between counsel for the parties and the Court from January 27, 2004 through December 8, 2005, and further to order that the Clerk of Court certify and forward these additional parts of the record to the United States Court of Appeals for the Fourth Circuit upon request.

Respectfully submitted,

//s//

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2005, I directed that the foregoing paper, Motion to Supplement the Record and proposed Order, be electronically filed and served via first-class mail, postage prepaid, to: Pamela A. Bresnahan, Esquire, Vorys, Sater, Seymour, and Pease LLP, 1828 L Street, NW, Suite 1111, Washington, DC 20036, Peter F. Axelrad, Esquire, Council, Baradel, Kosmerl, and Nolan PA, 125 West St, Fourth Floor, Annapolis, Maryland, 21404-2289, and Rodney R. Sweetland, III, Esquire, Adduci, Mastriani, and Schaumberg LLP, 1200 Seventeenth Street, NW, Fifth Floor, Washington, DC 20036.

//s//

Todd Gustin